IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

~~No. 948.~~ #1

FORD MOTOR COMPANY, *Appellant*,

v.

THE UNITED STATES OF AMERICA.

~~No. 949.~~

COMMERCIAL INVESTMENT TRUST CORPORATION, et al.,
*Appellants*,

v.

THE UNITED STATES OF AMERICA.

Appeals from the District Court of the United States for the Northern District of Indiana

## BRIEF AMICUS CURIAE.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## BRIEF AMICUS CURIAE.

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Permission to file this brief was granted by an order entered March 3, 1947. The brief is filed by Associates Investment Company, American Security Division of A. S. C. Corporation, and A. & A. Credit System, Inc., and on behalf of approximately 372 so-called independent automobile finance companies. They are members of a trade asso-

ciation called American Finance Conference. They are engaged in the business of financing wholesale and retail transactions in automobiles manufactured by Ford and others. They are the "independent finance companies" referred to in the complaint, and are one of the two groups who are the directly injured victims of the refusals, preferences, discriminations and restraints practiced by the appellants. (R. 1, 6, 8-11) The other group is composed of the approximately 11,000 Ford dealers referred to in the complaint. (R. 4)

Six of the appellants are also engaged in the automobile finance business. They are a group of affiliated corporations controlled by the appellant Commercial Investment Trust Corporation. In this brief it is not necessary to distinguish among them, and for brevity they will be referred to as CIT.

General Motors Acceptance Corporation, a wholly owned subsidiary of General Motors, will be referred to as GMAC.

## STATEMENT OF THE CASE.

About ninety-four per cent of the automobiles are made by Ford, Chrysler and General Motors. About forty-four per cent are made by General Motors; twenty-five per cent by Chrysler; and twenty-five per cent by Ford. (R. 3, 136.) The other six per cent are made by twelve to fifteen other companies. (R. 5, 124A, 124B, 136, 150)

The distribution of automobiles is divided into two major parts, both of which utilize financing facilities: (a) sales of units by the manufacturer to dealers, involving use of wholesale credit; and (b) sales by the dealers of units previously purchased from manufacturers to retail purchasers, utilizing retail credit.

More than four billion dollars per year is paid to automobile manufacturers for automobiles at wholesale. About two billions of this sum is advanced to dealers by automobile finance companies. (R. 6, 138, 141) More than eighty per cent of this two billions is furnished by three companies:

Commercial Investment Trust, Commercial Credit Company and General Motors Acceptance Corporation. (R. 139) The remaining twenty per cent is furnished by about 375 other finance companies. (R. 5-6, 139, 141) These percentages and other facts, although stated in the present tense, necessarily apply as of the time when the litigation began—November 1938.

CIT furnishes about 82 per cent of the wholesale money advanced for Ford cars. Commercial Credit and GMAC furnish about the same percentage for Chrysler and General Motors cars, respectively. (R. 6)

In the retail field, about sixty per cent of the new cars are sold by the dealers on credit. About six billion dollars is furnished by the finance companies for this purpose, five billions being advanced by the three companies named and the remaining one billion by the 375 other companies. (R. 6.) CIT furnishes about 70 per cent of the retail money for Ford cars. (R. 6-7) Commercial Credit and GMAC furnish about the same percentage for Chrysler and General Motors cars.

GMAC is controlled by General Motors, by 100 per cent stock ownership. (R. 5) No automobile transactions except those of General Motors dealers are financed by GMAC. GMAC confines car financing to wholesale transactions between the dealers and General Motors, and to retail transactions for new and used cars between the GM dealers and their customers. It does not compete with Commercial Credit, CIT or the other finance companies, for Chrysler or Ford business.

Chrysler and Commercial Credit are affiliated. Chrysler acquired a substantial part of the stock of Commercial Credit. Chrysler and Commercial Credit also entered into a contract, pursuant to which Chrysler caused its dealers to patronize Commercial Credit, for which Commercial Credit paid to Chrysler a substantial part of its consolidated net profits for each year, amounting to about one million dollars a year. (R. 5; Record in *Chrysler Corporation* v. *United States*, 316 U. S. 556; October Term, 1941, No. 1036)

Universal Credit Corporation (which is the Ford automobile financing department of CIT), was originally organized by Ford. Ford held all of the Universal Credit stock until 1933, at which time Ford sold all of the stock to CIT. (R. 2) Since that time CIT, Universal Credit and Ford have been affiliated in the automobile financing field by working agreement. (R. 5) Ford now seeks to reestablish the stock affiliation.

In three indictments returned at South Bend on May 27, 1938, the Government attacked as monopolistic and in restraint of trade the methods practiced by CIT, Commercial Credit, GMAC, Ford, Chrysler and General Motors, for the acquisition of the automobile financing business. One indictment charged a conspiracy between Ford and CIT and certain individuals; another charged a conspiracy between Chrysler and Commercial Credit; and the third, a conspiracy between General Motors and GMAC and individuals.

The acquisition methods charged in the three indictments are practically identical. The great economic weakness and dependence of the dealers, has made those methods effective to produce monopoly. (R. 150) The dealer may not and does not handle the cars of more than one manufacturer. His contract with the factory is for one year only, and provides that within that year, the factory may cancel and terminate it on short notice and without any specified cause. (R. 144-145)

In each of the indictments it was charged that for the purpose of coercing the dealers to patronize the affiliated finance company, the manufacturer refused to give any dealer a contract unless he promised to patronize that finance company exclusively (R. 144); threatened to cancel dealers' contracts because they had patronized other finance companies; actually cancelled dealers' contracts and refused to furnish them cars. (R. 145)

It was also charged that the manufacturer practiced many discriminations in favor of the affiliated finance company and against the unaffiliated companies. These in-

cluded furnishing to the affiliated company and withholding from the unaffiliated companies, the use of offices and quarters in the factories, giving to the affiliated company and refusing to all others information relative to sales and deliveries of cars to dealers, furnishing to the affiliated companies documents for security of loans made to dealers, and refusing the same assistance to the other companies, and imposing upon dealers patronizing unaffiilated finance companies onerous requirements relative to payment for automobiles, not imposed upon dealers patronizing the affiliated company. (R. 146-148)

The indictments charged that it was the practice of the manufacturer to advertise, endorse and recommend the use by dealers of the financing services of the affiliated company to the exclusion of other companies. (R. 148)

It was charged that the dealers were compelled to permit examination and inspection of their books and records, to enable the defendants to discover and prevent transactions with unaffiliated finance companies, that the manufacturer procured such information from employees of dealers without the knowledge of the dealers, and sometimes by bribery; and that where such patronage was discovered, dealers were required to explain and justify the relations. (R. 145-146)

The defendants in the General Motors-GMAC indictment were tried and convicted at South Bend on November 17, 1939. The conviction was affirmed by the Circuit Court of Appeals at Chicago on May 7, 1941. (121 F. 2d 377.) Certiorari was denied by this Court. (R. 159)

On November 15, 1938, one year prior to the trial and conviction in the General Motors case, however, consent decrees were entered in the Ford and Chrysler cases, and the indictments against the Ford and Chrysler groups were dismissed. (R. 18)

The complaints on which the decrees were based were filed at South Bend on November 7, 1938, a week prior to the entry of the decrees. The use of the same methods of

business acquisition stated in the indictments was alleged in the complaints. (R. 7-11.) In the Ford-CIT case it was added that agents of CIT were permitted by Ford to attend its sales meetings with dealers for the purpose of procuring the financing business; that that privilege was denied to other finance companies; that for the same purpose agents of Ford and CIT jointly visited and solicited dealers; and that that assistance was denied by Ford to competitors of CIT. (R. 9, 11)

The complaint in the Ford-CIT case also alleged that, unless enjoined, Ford would discriminate in favor of CIT by the acquisition of stock or other interest in that company. (R. 11)

The decrees are probably the most complicated ever entered in an antitrust case. The prohibitions are loaded with qualifications, conditions, sub-qualifications, sub-conditions and exceptions under which Ford and CIT may in large measure practice the coercive and discriminatory methods.

The decree also contains two major defeasance conditions.

The first condition provided for a total suspension of the decree. The condition was that if the criminal case then pending against General Motors should not result in a conviction, every prohibition of the decree should become inoperative and suspended, until like prohibitions should be imposed upon General Motors. It was provided that any agreement, act or practice held to be the proper basis for a verdict of guilty by the trial court in its instructions to the jury, should be considered the equivalent of a decree prohibiting such agreement, act or practice. (R. 35-36)

It was provided, further, that upon application of the defendants, the court "will enter orders" suspending restraints upon Ford and CIT not imposed upon General Motors. (R. 36)

The second condition provided for a partial suspension; that is, that if prior to January 1, 1941, General Motors had

not been required to divest itself of all ownership and control of GMAC, then Ford should not be prevented from acquiring ownership and control of a finance company. (R. 34-35)

The first condition was met by the verdict of guilty returned November 17, 1939. On this appeal, however, the appellants contend that as to certain provisions of the decree the condition has not been met by that conviction.

Full compliance with the second condition (separation of General Motors and GMAC), has not been had. Proceedings for that purpose were initiated on October 4, 1940, when an action was brought against General Motors in the District Court at Chicago, for the purpose of procuring the divestiture and a prohibition of the practices. Thereafter up to July 9, 1945, the depositions of 220 witnesses were taken by General Motors; and General Motors had at that time indicated an intention to examine approximately 200 more. At that time, therefore, the Government in an effort to expedite the case, filed a motion to limit additional depositions; but as of December 31, 1945, no ruling had been made on that motion. (R. 69-70) Since December 21, 1940, the requirement for full compliance with this condition has been postponed from year to year with the consent and agreement of the appellants, until January 1, 1946. (R. 42, 43, 66-68.)

On December 31, 1945, the Government filed a motion for the extension of the bar against affiliation for an additional year, until January 1, 1947. On May 4, 1946, Ford filed an opposition to this motion, and at the same time filed its own motion for modification of the decree to permit affiliation and for suspension and modification of provisions of the decree relating to practices. CIT also filed a motion seeking the same suspensions and modifications as to practices (R. 66, 70, 74, 76, 187), but sought no change in the anti-affiliation provisions.

By the motions the appellants sought permission to Ford (1) to acquire control over or an interest in any finance

company, and (2) to recommend, endorse or advertise any plan or finance company to any dealer or the public either in conjunction with or independently of any finance company; and permission to Ford and CIT (3) to have their agents "together be present with any dealer or prospective dealer for the purpose of influencing the dealer or prospective dealer to patronize" CIT. (R. 23, 30, 32, 76)

The District Court found that the Trial Court[1] in its instructions held the agreements, acts and practices enjoined in the decree, constituted a proper basis for a general verdict of guilty, and that Ford and CIT were not laboring under any competitive disadvantage in favor of General Motors and GMAC because of that injunction. (R. 159) Hence, that the first condition as to the continuation of the injunction against the practices, had been met.

The District Court also found that time was not of the essence with respect to the bar against affiliation, that Ford had offered no proof that further extension of the bar would place it at a competitive disadvantage, that further extension would not in fact place it at such a disadvantage, and that the government had proceeded diligently and expeditiously in the General Motors suit. (R. 158, 160)

**The Plan Which Ford and CIT Propose to Put Into Effect, Constitutes a Combination and Conspiracy to Restrain and Monopolize Trade and is in Violation of the Antitrust Laws.**

The legal issues involved in this litigation, and the application of the law thereto, are best understood in relation to the fundamental steps heretofore mentioned involved in the distribution of Ford automobiles. In this distribution two steps are involved, each separate and distinct: Step 1, sales of motor vehicles by Ford to its dealers; Step 2, sales by dealers to retail buyers.

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[1] The District Court and the Trial Court were the same Court. District Judge Walter C. Lindley presided at the trial and charged the jury. (R. 108.) District Judge Patrick T. Stone, heard and decided the motions for suspension and modification. (R. 162)

In step 1 Ford Motor Company sells its cars to all Ford dealers for cash, at the factory and before delivery. At or before the time the cars are moved from the factory for delivery to the purchasing dealer, every car has been paid for in full. Credit by Ford is absolutely excluded. Ford sells on the same cash basis on which a vending machine operates: full cash payment in the slot before delivery. This is a basic, invariable and controlling fact in this case. It means that Ford has transferred title, ownership and possession to new owners, namely, the retail dealers, before any subsequent trade in Ford cars has begun.

Ford has its own reasons for this "cash—no credit" policy. The benefits and wisdom of the policy are obvious. The reasons are immaterial. The important fact is that Ford chooses not to assume the responsibility and risks and the trouble and cost of administering a credit system. While Ford so demands and receives cash on delivery for its merchandise, it is necessary usually for the dealers to borrow in order to make this cash purchase.

Loans to dealers for the wholesale purchase of cars, are transactions in which the dealer's promissory note for the amount of the loan is secured by some form of lien on the cars which are purchased with the money, with an arrangement for releasing the lien in whole or in part, as the cars are later sold by the dealer. These loan transactions are wholly between the dealers and the lenders. No endorsement or other assurance of payment to the lender is given by Ford. The antitrust action here involved was brought because Ford coerced the dealers to borrow such money exclusively from CIT.

In step 2, the retail dealer sells the new car, in which Ford no longer has any ownership, to a retail buyer, either for (a) cash, or (b) upon an installment payment plan. In these transactions, the dealer usually receives a negotiable promissory note signed by the purchaser and payable to the dealer, in monthly or other periodical installments. Payment is assured by some form of lien or conditional

sales provision. The promissory note and the contract are, of course, the sole property of the dealer. He may (if not subjected to unlawful interference) hold and collect it or sell it to whom he pleases.

Banks, automobile financing companies and other credit agencies, desire and offer to buy these notes from the dealers. Purchases of the notes from the dealers are made on a discount basis. This antitrust action was brought because Ford also coerced the dealers to sell the notes and contracts exclusively to CIT.

The Ford and CIT motions disclose a plan for financing the purchase and sale of Ford cars, to be jointly devised, owned, operated and controlled by Ford and a finance company (probably CIT).

If the District Court shall be reversed, a combination between Ford and a finance company will be established for the purpose and with the effect of together acquiring all of the financing of wholesale and retail transactions in Ford cars. To that end they will recommend, endorse and advertise the affiliated company as the one to be patronized by the dealers. The agents of Ford and the affiliated finance company will together call upon and jointly solicit the dealer to induce him to patronize the affiliated finance company.

The susceptibility of the dealers to these methods is greatly increased by their notoriously weak economic condition, and especially by their precarious contractual position with Ford. Referring to the economic condition of the dealers, the indictment in the General Motors case stated:

> the automobile dealers . . . have had substantial investments of money, credit, and property in their businesses of purchasing and selling automobiles, as aforesaid; said investments and businesses would have been greatly reduced in value and destroyed by the defendants carrying out the aforesaid intimations, suggestions, threats, cancellations, and statements; and to prevent such destruction, loss and damage of and to their investments and businesses, all or almost all of

the dealers, have complied with said intimations, suggestions, threats, and statements. (R. 150)

Prior to the indictment and decree, the same business acquisition methods enabled CIT to acquire 82 per cent of the Ford wholesale financing and 70 per cent of the retail financing—which included all the cream of the business and as much of the remainder as they cared to take. (R. 6-7)

Will dealers, whose business existence is based upon a one-year contract with Ford, which places no real contractual obligation upon Ford, and who are out of business if they receive no Ford cars, challenge and displease Ford and commit commercial suicide by exercising a real freedom of choice among finance companies by not dealing exclusively with the company with which Ford is affiliated by proprietary interest, which Ford has recommended, advertised and endorsed, and with whom Ford has jointly solicited them? Will the dealers give their business to companies which they know Ford does not want them to patronize?

*The continuation of the prohibition of acquisition by Ford of ownership and control of a finance company, is necessary to prevent and restrain a violation of the anti-trust laws.*

The Ford proposal is not merely to acquire an investment interest in a finance company, but to acquire ownership and control as an important and essential part of a comprehensive plan, the purpose and effect of which will be to restrain and monopolize the business of financing the purchase and sale of Ford automobiles.

The acquisition would be violative of the Sherman Act and of Section 7 of the Clayton Act, the latter of which expressly prohibits such a transaction.

The Clayton Act states:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of

the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be . . . to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce. (U. S. C. A., Tit. 15, Sec. 18)

It is only necessary that the proposed acquisition "may" restrain trade. As stated by this Court in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 357:

> It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly.

There can be no doubt that in the circumstances disclosed in this case, and in the light of the decision of the Circuit Court of Appeals in *United States* v. *General Motors Corporation*, 121 F. (2d) 376, the effect of the acquisition to restrain and monopolize is not merely a probability but a certainty.

The acquisition is part of a plan to procure and exercise control. The mere acquisition and possession of the power makes the transaction illegal.

> . . . to vitiate a combination . . . it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce and to deprive the public of the advantages that flow from free competition . . . *Northern Securities Co.* v. *United States*, 193 U. S. 197, 332.

> When men deliberately and intelligently go to work and acquire power that will enable them to control the market if they choose to exercise it, there is no use for them to say that they did not intend to control the trade or limit competition. Nor, when the legality of their act of acquisition is in question, is it any use for them to say that they have not used the power to oppress anyone • • • The law regards such a power ac-

quired by such a combination as dangerous to the rights of the people and forbids its acquisition. *State* v. *Harvester Co.*, 237 Mo. 369, 394.

In the *Northern Securities case*, 193 U. S. 197, 337, this court said:

> In all the prior cases in this court the antitrust act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce.

In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189, the court said:

> The Court has quite consistently recognized in this type of Sherman Act case that the government should not be confined to an injunction against further violations. Dissolution of the combination will be ordered where the creation of the combination is itself the violation. (citing cases) Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy.
>
> But the relief need not, and under these facts, should not be so restricted. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination, against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. Hence we do not think the District Court abused its discretion in failing to limit the relief to an injunction against future violations. There is no

reason why the protection of the public interest should depend solely on that somewhat cumbersone procedure when another effective one is available.

The fact that the charges of the indictment and complaint were not put to the test of proof, does not change the rule or power of the court. In answer to the contention that restrictions of a consent decree should be lifted because there had been no proof and no adjudication of guilt, this Court said in *Swift & Co.* v. *United States*, 276 U. S. 311:

> The argument is that as the Government made no proof of facts to overcome the denials of the answers, and stipulated both that there need be no findings of fact and that the decree should not constitute or be considered an adjudication of guilt, it thereby abandoned all charges that the defendants have violated the law; and hence the decree was a nullity. The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong although no right has yet been violated. (p. 326)

*The proposed practice by Ford of recommending, endorsing and advertising an affiliated finance company, and the joint solicitation of the dealers by the Ford and finance company agents, are inherently discriminatory and alone and as parts of a plan are monopolistic.*

Ford does not intend to treat all finance companies equally. It needs no suspension of the decree to accord such equal treatment. It needs a suspension only because it proposes to discriminate against all but one of the companies.

The theory of the appellants is that the legality of these practices is to be determined as if they were unrelated to, and separate and apart from the other parts of the plan. Nothing could be more erroneous. The plan must be considered as a whole, and in the light of its purpose and effect. The certain monopolistic effect of the parts of the plan, separately and as a whole, is made more inevitable by the

relatively small size and resources of the dealers; the lack of any real contractual obligation on the part of Ford to furnish them with cars; the large size and resources of Ford; the fact that the dealer's business existence is absolutely dependent upon the pleasure of Ford. The following statement on this subject by the Circuit Court of Appeals, with regard to General Motors is equally true as to Ford.

> The record shows that the appellants hold a dominant position in the automotive industry, GMC being the largest manufacturer in the United States and GMAC being the largest sales finance company in the world. On the other hand, every dealer owns one of the 15,000 dealerships located throughout the country, and his status is determined by the franchise agreement which is subject to annual renewal and to cancellation on very short notice without cause. Although every dealer is an independent business man, the supervision and control exercised by GMAC and GMSC over his business operations is almost as complete as if the dealer were an agent in all respects. Every dealer also acquires a substantial investment in buildings, cars, parts and accessories, and builds up good will in his community. Consequently a cancelled dealership leaves the appellants with one less retail outlet which can be replaced readily, but leaves the disenfranchised dealer without a business and burdened with his substantial investment in the liquidation of which he is likely to sustain a heavy loss. (121 F. (2d) 397-398)

A conspiracy in restraint of trade is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole:

> *Montague* v. *Lowry*, 193 U. S. 39, 45-46
> *United States* v. *Patten*, 226 U. S. 525, 544.

As stated by this Court in *Swift* v. *United States*, 196 U. S. 375:

> The scheme as a whole seems to us to be within reach of the law . . . It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful.
>
> *Aikens* v. *Wisconsin*, 195 U. S. 194.

Again, in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, this Court said:

> We may assume that if a single exhibitor launched such a plan of economic warfare he would not run afoul of the Sherman Act. But the vice of this undertaking was the combination of several exhibitors in a plan of concerted action. They had unity of purpose and unity of action. (p. 259)
>
> It is not for us, however, to pick and choose between competing business and economic theories in applying this law. Congress has made that choice. It has declared that the rule of trade and commerce should be competition not combination. (p. 261)

The plan which Ford and CIT propose to put into effect, is a plan which they have together and in combination formulated, and which they will jointly and in combination put into effect. It is a plan which they will jointly control, and in which they will have a community of proprietary and pecuniary interest. Moreover, Ford, although having parted with all property interest in the cars the purchases and sales of which are to be financed by the combination, will nevertheless intrude into the financing field and become a competitor of all other financing companies. This joint action meets every definition of combination and conspiracy, and as has been held by the Circuit Court of Appeals in *United States* v. *General Motors Corporation*, 121 F. (2d) 376, 399, "the necessary and inevitable effect" will be to produce two distinct restraints of trade.

**No Suspension or Modification of the Decree is Permissible on the Theory that the Attorney General Made a Contract With or Gave a Promise to Ford and CIT.**

In the District Court Ford contended that any opposition to the Ford and CIT motions—

> is a breach of contract by the Department and a violation of the representations of the Department. (*Brief of Respondent Ford Motor Company in Support of motion to suspend and modify provisions of consent decree*, p. 5)

In the District Court CIT made the same contention, as follows:

> We say that we are entitled to a suspension of these . . . two paragraphs; that's all it is, because they didn't comply with certain conditions. We say it is mathematically demonstrable, just like two and two is four, that they haven't got a consent decree against General Motors and the instructions didn't cover the things we are asking relief from. And we say that *the Government like any other party who makes an agreement, should be bound by that agreement.* (*Transcript of Proceedings*, pp. 107, 108.)

In the Ford brief the subject is characterized in the nomenclature of contract and agreement. It is referred to as a "compromise of the conflicting interests of Ford and the Government", as a compromise agreed to by the parties and their "negotiators". (Ford Brief, pp. 50-53)

According to the Ford and CIT motions, the terms of the agreement are found in paragraphs 12 and 12a of the decree, wherein, they assert, they were given an absolute right to have the decree vacated. They contend that the parties to that agreement intended that the action of the court to make that agreement effective, should be "automatic"; in other words, ministerial, not judicial.

Paragraph 12 provides that if prior to January 1, 1946, no decree has been entered divesting GM and GMAC, noth-

ing in the Ford-CIT decree shall prevent Ford from acquiring ownership and control of a finance company.

Paragraph 12a provides (1) that if GM is not convicted, every provision of the Ford-CIT decree shall be suspended until similar restrictions are imposed on GM by a final decree; (2) that a general verdict of guilty against GM shall be the equivalent of a decree determining the illegality of and prohibiting "any agreement, act or practice" which the court shall have instructed the jury would constitute a proper basis for a verdict of guilty; and, (3) that after the entry of such a decree, Ford or CIT may apply for, and the court will suspend any restraints not contained in the GM decree.

The motions quote statements made by officials of the Department of Justice, made prior to and contemporaneously with the alleged contract, as authoritative and binding statements of the purpose and intention of the parties to the contract; all of the statements being to the effect that General Motors was not to have a competitive advantage over Ford and CIT. (R. 82-85)

The theory of the appellants is that the legality of their plans is immaterial. The theme is that the decree is an agreement between them and the Attorney General that they are not to be molested in making a corporate affiliation, in recommending, endorsing and advertising the use by Ford dealers of a preferred finance company, and in jointly soliciting the dealers to cause them to use that company, unless there shall be a separation of General Motors and GMAC, and unless the District Court shall condemn those practices in the General Motors case. They contend that, no such separation and no such condemnation having occurred, they are now entitled to the "automatic" action of the court in awarding specific performance of that contract.

If it was the intention on the part of the prosecuting officers that the appellants were to have this action for the purpose of meeting even an UNLAWFUL competitive advantage by General Motors, by being permitted to engage

in similar unlawful conduct, the appellants thus impute to the Attorney General, his assistants, and the District Attorney the making of an unlawful contract, not to discharge the duty imposed upon them by statute—

> to prosecute . . . all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned . . . (USCA, Tit. 28, sec. 485),

and

> to institute proceedings in equity to prevent and restrain violations

of the antitrust laws. (USCA, Tit. 15, sec. 4)

Such a contract is contrary to public policy, and will not be aided by the courts. While the courts may not regulate or control the prosecuting officials in the administration of the antitrust laws, they should not clear the way for the performance of improper arrangements.

The removal of a competitive advantage between Ford and General Motors, and between CIT and GMAC, by permitting an affiliation between Ford and a finance company, would not establish a situation in harmony with the law. It would merely aggravate the existing monopoly condition. The theory that the problem of restraint and monopoly would be solved by putting the three great motor car companies and the three great finance companies on that basis of equality, is based upon the erroneous assumption that they are the only companies in the business and are the only ones entitled to that competitive advantage. That remedy would merely increase restraint, monopoly and illegality. The twelve or more other motor car companies and the 375 other finance companies, who are equally entitled to be free from such competitive conditions, would continue to suffer in greater degree the competitive disadvantage of which Ford and CIT now complain. This remedy, which disregards and relegates them to a status of inequality, ought not to be sanctioned by this Court.

There was no consideration flowing to the Government in the alleged contract. The appellants merely consented not to violate the law. They assert that they agreed to "prohibitions and requirements that actually go beyond the requirements of the Sherman Anti-Trust Law," (R. 87) and to "provisions which otherwise could not be obtained under existing law". (R. 195) But, as shown, the prohibitions of the decree are well within the statute.

The decree was by no means a gratuity from Ford and CIT to the Government. It was small payment for what the appellants received, and incomplete compliance with the law. In exchange for the decree they escaped trial and the grave jeopardy of conviction for conduct like that for which General Motors was later convicted. In addition, they received generous and questionable concessions and privileges, enumerated in the decree. They prevented the procurement of a judgment which could be used as prima facie evidence in treble damage actions.

A consent decree is not a contract but a judicial act. Any theory that such a decree is a contract between defendants and the Attorney General, and, therefore, may contain provisions limited by their own wishes and private contractual capacity, is erroneous, as was indicated by this Court in *United States* v. *Swift & Co.*, 286 U. S. 106, as follows:

> We reject the argument for the interveners that a decree entered upon consent, is to be treated as a contract and not as a judicial act. A different view would not help them, for they were not parties to the contract, if any there was. All the parties to the consent decree concede the jurisdiction of the court to change it. The interveners gain nothing from the fact that the decree was a contract as to others, if it was not one as to them. But in truth what was then adjudged was not a contract as to any one.

**The Court Has No Jurisdiction to Make the Suspensions and Changes Sought, Because that Action Would Not Prevent and Restrain But Would Permit Violations of the Antitrust Laws.**

The questions which arise on these motions must be decided according to the rules of law and the principles of equity. A decision is not permissible which is made to carry out a deal, contract or promise between the parties to the decree, if their transaction is in conflict with the law and equity. This is true even though that contract is embodied in the decree, in whole or in part, either as a condition or qualification to operate as a suspension or otherwise. Where such a contract or such provisions of the decree are in conflict with the law and equity, law and equity must prevail and must be applied by the Court.

The contention of the defendants is to the contrary. They contend that their contract with the Attorney General and the decree, state and establish their rights. Stated in another way, the contention is that the question of conflict between the general law, the law against restraint and monopoly, and the principles of equity, on the one hand, and the contract and the provisions of the decree on the other, is irrelevant and immaterial.

They contend that the function of the Court at this stage is ministerial and not judicial; that its jurisdiction is limited to answering two simple questions of fact: (1) whether a decree has been entered in the civil antitrust case pending against General Motors at Chicago; and (2) whether the District Court in the criminal case against General Motors, instructed the jury that any "agreement, act or practice" prohibited in the Ford and CIT decree was illegal.

They contend that, having made this ministerial decision, the action of the Court with regard to changing the decree is "automatic".

The argument was stated by counsel for CIT in the District Court as follows:

> We say that we are entitled to a suspension of these . . . two paragraphs; that's all it is, because they didn't comply with certain conditions. We say it is mathematically demonstrable, just like two and two is four, that they haven't got a consent decree against General Motors and the instructions didn't cover the things we are asking relief from. And we say that the Government like any other party who makes an agreement, should be bound by that agreement. (*Transcript of Proceedings*, pp. 107-108)

The entry of the decree was a judicial act. The making or refusal of the suspensions and modifications is a judicial act. The question of the legal character of the present plan and purposes of the appellants, is therefore open and should control the action of the court.

The action of the Court upon the motions is limited by its jurisdiction. The Court has no jurisdiction to suspend provisions of this decree if the suspension will operate to permit the appellants to effectuate plans and purposes which are contrary to law.

The District Courts are given jurisdiction only to "PREVENT AND RESTRAIN" violations of the antitrust laws. This does not, of course, include jurisdiction to do precisely the opposite, to change, suspend or abrogate provisions of a decree where the effect will be to permit parties to violate the antitrust laws.

The Sherman Antitrust Act provides:

> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. (U. S. C. A., Tit. 15, Sec. 4)

The rule as to the remedy within the jurisdiction of the courts was stated by this Court in *United States* v. *Standard Oil Co.*, 221 U. S. 1, as follows:

> * * * to meet the situation with which we are confronted the application of remedies two fold in character becomes essential: 1. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about. (pp. 77-78)

This Court has consistently followed the same rule to the present day. In *United States* v. *Bausch and Lomb*, 321 U. S. 706, 726, it said that the test of a proper decree under the antitrust laws "is whether or not the required action (of the decree) reasonably tends to dissipate the restraints and prevent evasions."

This decree is not one between private parties for the settlement of a private controversy, in which only the private affairs, property and interests of the immediate litigants is affected. The decree applies to a great trade and commerce, of the most important and widely ramified public interest. It deals with the business and property of upwards of 11,000 Ford automobile dealers, indirectly of about 40,000 dealers in other cars.

It affects the lawful rights and business and property of 375 or more automobile finance companies and lending agencies. In the same manner it affects millions of purchasers of automobiles. It deals with the great public policy of equality of opportunity in trade and commerce versus restraint and monopoly, and the enforcement of that policy.

## Conclusion.

It is respectfully submitted that the order of the District Court should be affirmed.

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